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No. 03-636

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

BERT H. DEIXLER
Counsel of Record
LOIS D. THOMPSON
AARON P. ALLAN
TANYA L. FORSHEIT
LEE K. CRAWFORD
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(310) 557-2900

Counsel for Petitioner

185652

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondents do not dispute – because they cannot – that this case squarely presents two important questions regarding the scope of the Equal Protection Clause's prohibition against state-imposed racial segregation. Respondents' only substantive argument – that no split of authority exists among federal circuit courts with respect to the application of *Turner v. Safley*, 482 U.S. 78 (1987), to invidious racial classifications in prisons – lacks merit. The Ninth Circuit's ruling that *Turner* permits explicit racial classifications to evade strict scrutiny review if, and only if, they apply to prisoners is in direct conflict with decisions of the Fifth, Seventh, Eighth, and District of Columbia Circuits, *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995); *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994); *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987), and is irreconcilable with this Court's longstanding and recently reaffirmed jurisprudence that *all* intentional state racial segregation is subject to strict scrutiny when challenged under the Fourteenth Amendment. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Lee v. Washington*, 390 U.S. 333 (1968).

Review is essential to clarify whether explicit government racial classifications may evade strict scrutiny so long as those classified reside in jails and prisons.

ARGUMENT

I. Review Would Resolve A Clear Conflict Among The Circuits.

Respondents' assertion that the "circuit courts do not conflict concerning whether *Turner v. Safley* applies to equal protection claims in prison cases" (Opp. at 13) is simply wrong. The Ninth Circuit's decision directly conflicts with decisions of the Fifth, Seventh, Eighth, and District of Columbia Circuits. *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995); *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994); *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987).

With respect to the Fifth Circuit, Respondents assert an absence of conflict based on the mistaken claim that *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994), does not discuss any particular standard of review for an equal protection claim based on racial segregation of double cells. (Opp. at 12.) To the contrary, *Sockwell* explicitly applied the strict scrutiny standard of *Lee v. Washington*, 390 U.S. 333 (1968) – the very standard rejected by the Ninth Circuit below. *Compare Sockwell*, 20 F.3d at 191-92, *with* App. at 8a-11a. *Sockwell* is in direct conflict with the Ninth Circuit's decision.

Respondents also assert that *Sockwell* creates no circuit split because that case involved allegations of disparate treatment based on race. In *Sockwell*, as here, prisoners claimed their constitutional rights were violated by the prison authorities' racial segregation of two-man cells. 20 F.3d at 189. The prisoners in *Sockwell* also alleged that white prisoners in two-man cells received preferential treatment over black prisoners, *id.* at 190, but the court's holding that

the prisoners' right to equal protection was violated by the racial segregation of cells did not depend on those allegations. *Id.* at 191-92. Moreover, Respondents' suggestion that the facially discriminatory racial classification in *Sockwell* would not have been subject to strict scrutiny if it had been applied equally to all races or ethnicities was discredited long ago in *Loving v. Virginia*, 388 U.S. 1 (1967). When dealing with laws "containing racial classifications, . . . the fact of equal application does not immunize the [law] from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state [laws] drawn according to race." *Id.* at 9.

As to the Seventh Circuit, Respondents fail in their effort to argue that *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987), another case in which a circuit court applied strict scrutiny to policies or practices of prison racial segregation, does not conflict with the decision below. Respondents mischaracterize subsequent Seventh Circuit cases as determining that *Turner* should apply in all cases that implicate constitutional rights. To the contrary, the rulings in both *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987), and *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), cited by Respondents, are narrow and do not undercut the holding in *Black*. Neither case involved any equal protection claims based on a suspect classification. Both cases involved claims that prison officials violated inmates' First Amendment rights by restricting their religious practices.[1]

1. Although inmate Reed claimed that a policy forbidding inmates to wear long hair discriminated against black Rastafarians in favor of American Indians, against whom the hair-length regulation was not enforced, the prison policy considered in *Reed* was facially race-neutral. *Reed* thus sheds no light on the applicability of *Turner* to prison policies that classify based on race. Further, *Reed* and *Hadi* involved prison regulation based on practices, rather than on the immutable *identity* of the inmate.

Similarly, Respondents fail to persuade that the Eighth Circuit, in *Goff v. Harper*, 235 F.3d 410 (8th Cir. 2000), somehow retreated from its prior holding, in *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995), that the heightened scrutiny traditionally given gender-based equal protection claims applies to such claims in prisons. *Goff* applied the *Turner* standard of review to inmates' claims of violations of their Eighth Amendment right against cruel and unusual punishment and their Fourteenth Amendment right to substantive due process. *Goff*, 235 F.3d at 412. While the court acknowledged that the "*Turner* test should be applied outside First Amendment cases" to the Eighth Amendment and due process claims, it never held that *Turner* would apply to cases ordinarily accorded heightened scrutiny under the Equal Protection Clause. The Eighth Circuit thereby did not disturb either *Pargo* or the holdings of its district courts that strict scrutiny applies to prison racial classifications.[2] The Eighth Circuit remains in conflict with the Ninth as to whether *Turner* should be applied to examine the use by government of suspect classifications in prisons.

Finally, with respect to the District of Columbia Circuit, Respondents mistakenly rely on *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and *Washington v. Harper*, 494 U.S. 210 (1990), in an attempt to limit the relevance of *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), which held that heightened scrutiny applies, notwithstanding *Turner*, in cases

2. *See Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) (strict scrutiny applied to examine claim that prison officials used race as a primary factor for making housing assignments); *accord Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993) ("Racial discrimination in the administration of prisons violates the [E]qual [P]rotection [C]lause, unless it is justified by a compelling state interest.") (citing *Black v. Lane*, 824 F.2d at 562).

involving gender-based discrimination by prison officials. Unlike *Pitts*, neither *Harper* nor *Abbott* involved suspect classifications based on race or gender. In *Harper*, the Court applied *Turner* to a substantive due process claim related to forced administration of anti-psychotic drugs. *Harper*, 494 U.S. at 213, 223. In *Abbott*, the Court applied *Turner* to a First Amendment claim of prison censorship. *Abbott*, 490 U.S. at 403-04.

The court of appeals in *Pitts* expressly considered and rejected *Turner's* application to suspect classifications on the basis of gender in the prison context. *Pitts*, 866 F.2d at 1453-55. That court's holding that heightened scrutiny remains the appropriate standard when analyzing facial gender classification, even after *Turner*, has not been overruled.[3]

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions.

Respondents do not and cannot refute this Court's longstanding jurisprudence holding that *all* governmental racial classifications are subject to strict scrutiny, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), including racial segregation by state prison authorities. *Lee v. Washington*, 390 U.S. 333 (1968).

3. Respondents suggest that *Pitts* does not create a circuit split because it did not involve prison security or day-to-day management concerns. (Opp. at 12.) However, the court in *Pitts* based its decision not only on the fact that the challenged prison practices involved budgetary policy choices, but also, significantly, on the fact that the case touched upon the very "concerns the Court has clearly held call for stepped-up scrutiny." *Pitts*, 866 F.2d at 1454.

While *Grutter*, *Gratz*, *Adarand*, and *Croson* did not involve the prison environment, Respondents do not and cannot explain how the broad conclusions of those cases that *all* governmental racial classifications are subject to strict scrutiny can be reconciled with the Ninth Circuit's holding. Nor can Respondents explain away the Court's holding in *Lee* expressly invalidating racial segregation in the prison context.

Review is warranted to clarify that this Court's application of strict scrutiny to invidious racial classifications finds no exception where those classified reside in jails and prisons.

III. The CDC's Racial-Segregation Policy Has Not Faced – And Would Not Survive – Strict Scrutiny.

Respondents' argument that review is unnecessary because the California Department of Corrections' (CDC) policy of racial segregation would survive strict scrutiny is belied by the Ninth Circuit's opinion, which plainly found the standard of review outcome-determinative. (*See* App. at 11a.) After distinguishing this case from those in which other courts applied strict scrutiny, the Ninth Circuit noted that, "in a close case such as the one at hand, . . . the standard of review is paramount." (App. at 11a.) In fact, the Ninth Circuit panel went to some lengths to *avoid* applying *Lee*'s heightened standard of review. (*See* App. 8a-11a.) There is no support whatever for Respondents' contention that the CDC's policy would survive strict scrutiny.

Because the Ninth Circuit subjected the CDC's policy of routine racial segregation only to the deferential *Turner* standard of review, the court did not search for the narrow tailoring usually required on judicial review of state racial

classifications. Had the Ninth Circuit attempted to apply strict scrutiny, the CDC's policy would have failed as a result of, among other things, (i) the state's use of race as a proxy for the acknowledged problem of gang-affiliation (Opp. at 5); (ii) automatic re-segregation of prisoners upon their transfer to a different institution (Opp. at 1, 3; App. at 2a); and (iii) blanket application of racial segregation to every inmate, regardless of individual characteristics or necessities (Opp. at 1; App. at 2a-3a).

CONCLUSION

"Separate but equal" has no place in twenty-first century America, even in our nation's prisons. For the reasons set forth in the petition and in this reply, Petitioner respectfully requests that the Supreme Court grant a writ of certiorari and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

BERT H. DEIXLER
Counsel of Record
LOIS D. THOMPSON
AARON P. ALLAN
TANYA L. FORSHEIT
LEE K. CRAWFORD
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(310) 557-2900

Counsel for Petitioner